

Freedom of expression and the media in the digital age: The U.S. Experience and Lessons for Zimbabwe

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Thank you for that introduction Loughy Dube

I'm very glad to be able to join you all to talk about the issue that has provided big opportunities and challenges for both the United States and Zimbabwe and, quite frankly, opportunities and challenges for the whole world.

For centuries, the right to be heard has been seen as the cornerstone of democracy - it enables other rights to exist. In the age of the borderless Internet, the protection of the right to freedom of expression “regardless of frontiers” democratic governments have a positive obligation to create an environment in which everyone is free to seek, receive and impart information by and through means of their choice – also on the Internet – including journalists and media professionals¹.

I am sure you have heard this many times, but it is worth repeating- the right to freedom of expression is universal – universal also in regard to the medium and technology². Simply put, this means that it was not designed to fit a particular medium, technology or platform. Freedom of expression applies to all means of communications, including through digital platforms.

It is in this context that I would like to thank Loughy Dube and Faith Ndlovu of the Voluntary Media Council of Zimbabwe (VMCZ) for facilitating this talk today. The work of the VMCZ is one we see as very important in Zimbabwe's changing media landscape. With time the public will begin to appreciate the important work you do as well as the critical role of voluntary regulation in the

¹ Dunja Mijatović (2012)- Url: http://www.suedosteuropa.uni-graz.at/sites/default/files/event_attach/Public%20Lecture_University%20of%20Graz_June%202012.pdf

² UN Human Rights Council, 2011-
http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

media sector in promoting a conducive environment for the work of journalists and the media.

Let me also thank Ms. Nqobile Nyathi, chairperson of the Journalism Studies department and the rest of the teaching staff at the National University of Science and Technology (NUST). You all are playing a critical role in ensuring that the future of independent and objective journalism is realized in Zimbabwe. Our partnership with the journalism department has a long history. I am aware that you have hosted Fulbright Professor Eleanor Burkett for a number of years.

In the past three years, my department has hosted some of your students on a rare internship experience that has been conducted parallel to our flagship media program, the Women Journalists Mentoring Program, which has worked with about 45 young and promising women journalists to develop their professional writing and leadership skills.

Lindelwe Mgodla, who I believe is here, just completed a year with us and was part of the mentoring program. I am pleased to report that her excellent dedication, hard work and professionalism saw her being selected among the top five participants that went on to attend a Business Reporting Master Class Seminar sponsored by Barclays Bank in Grahamstown, South Africa ahead of the Highway Africa Conference last September.

Now, let me mention this at the outset; advancing media freedom is a regular part of U.S. diplomatic work. We advocate for freedom of expression and raise media freedom issues, including specific cases, in bilateral discussions with other governments and in multilateral bodies, including but not limited to the UN Human Rights Council, the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States.

In addition, each year, we work with the Department of State's Bureau of Educational and Cultural Affairs Edward R. Murrow Program for Journalists to invite journalists to the United States. According to a recent report evaluating media exchanges, the over 1,600 journalists and media professionals who participated in various Department of State exchange programs engage in activities that promote greater press freedom once they return home, such as advocating for freedom of information; protecting journalists' rights, and adopting new professional and ethical standards. Loughy Dube is one such example; and through the Voluntary Media Council has seen tremendous progress in promoting ethical journalism in Zimbabwe.

As a government, we also regularly monitor and report on the state of media freedom around the world — and threats to journalists — through the Country Reports on Human Rights Practices. Through our USAID office, we produce the Media Sustainability Index which measures the media environment in countries in African, the Middle East, Europe, and Eurasia.

I am therefore pleased to be here to talk about a subject that is so close to my heart- freedom of expression in the digital era.

The mention of this topic evokes a lot of thoughts and in my just over 12 months in this country I have witnessed how digital platforms have offered an alternative platform to the traditional media. Most Zimbabweans have blogs and I am sure you have read or heard about Baba Jukwa on Facebook and the subsequent arrests and trials of some individuals alleged to be behind the Facebook character. Today, I see a lot of messages about the Bulawayo Show via YouTube, which uses animation to drive messages across; a large majority of Zimbabweans I meet communicate via Whatsapp- a cross-platform mobile messaging app used to send text, video, images and audio via mobile phones. All these are examples of expression exercised using digital platforms.

My task today is to speak mainly about the experience of the United States using these platforms. We already live in the digital age, a time in which we can create truly democratic cultures with participation by all members of society; and in only a few years from now this participation will virtually include most of the world's citizens.

Let me start with something which to me clearly demonstrates the challenges of freedom of expression in the digital age.

In late 2006, students at a school in Turin, Italy, recorded a video showing them illegally bullying an autistic schoolmate³. They uploaded it to Google's video-sharing site, and Google took it down within hours of being notified by the Italian local police. But the video had been online for nearly two months by that time, and it caused national outrage, according to TheNextWeb.com. The video received 5,500 views, 80 comments, and made Google Italy's "most entertaining" list, according to an Associated Press report.

³ Cynthia Wong (2010)- Don't Blame the Messenger: Intermediary Liability and Protecting Internet Platforms in the e-Journal USA- Defending Internet Freedom (IIP) Publication, Department of State (June 2010)

Google helped the police identify the individual responsible for uploading the offending video. A court sentenced her and her accomplices to 10 months of community service.

That's where Google expected its involvement to end, according to a corporate blog posting on the case. However, a public prosecutor in Turin indicted four Google executives — chief legal officer David Drummond, global privacy counsel Peter Fleischer, former Google Video European Director Arvind Desikan, and former Chief Financial Officer George Reyes (who left the company in 2008) — charging them with criminal defamation and failure to comply with Italian privacy law. In February 2010, a judge convicted the first three defendants on the privacy charge. All four were found not guilty of criminal defamation. Matt Sucherman, a Google vice president and attorney, called the ruling “astonishing,” and the prosecutor’s action to try the executives “outrageous.”

The company plans to appeal the conviction.

In April 2010, the judge explained the reasoning underlying his verdict. In an 111-page opinion, Judge Oscar Magi said the executives were guilty of violating the privacy of the victimized youth and acted with malice because they had sought to make a profit with advertising income while hosting the video. Judge Magi said his decision should be interpreted as a requirement that Internet service providers screen video posted on their sites. Press accounts further quoted the opinion: “There is no such thing as the endless prairie of the Internet where everything is allowed and nothing can be prohibited.”

Google reiterated its initial reaction — that the verdict attacks the very principles of freedom on which the Internet is built. To date, free expression and privacy advocates are still evaluating the potential impact of the opinion, including questions it raises for participatory media and user-generated content platforms.

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago, where he has taught since 1972 says the Internet gets its genius because it is a decentralized system, where the parties who control the network create open access for content supplied by others. “To my mind,” he writes, “that one feature supplies an important institutional check against the excessive concentration of power in the hands of any single corporation, even one as virtuous as Google, whose officials in this instance should be canonized, not tied to some virtual cyber-stake.”

To Prof Epstein, the Italian government now wants Google to watch over all these new posts to assure that individual consents are obtained from everyone who was there. Imagine a teacher who posts a picture of her smiling class at graduation, or the sports enthusiast who posts a video of the crowd reacting to a goal by, or against, Manchester United or Real Madrid.

Whatever the reason a government allows intermediary liability, the substantial harm to information flows and Internet growth that follows outweighs the perceived benefits. First, freedom of expression inevitably is limited. A social networking platform, for instance, that can be held liable for money damages when a third party posts objectionable content, will wish to screen content before posting. Intermediaries will err on the side of caution in deciding what users may post, especially when the laws defining “illegal content” are vague and overbroad or where the speech is unpopular. In some cases, the sheer volume and associated cost of this task will be too much for many platforms to bear and they could not offer their services at all.

Second, intermediary liability- as happened to Google in Italy- disrupts the free flow of information and services on the Internet and thus stifles creative innovation and economic development. Companies are less likely to invest in technologies that may expose them to liability. The world may never see tomorrow’s Bloggers, Twitters, eBays, or other startups holding the promise of lowering prices and better connecting global markets; or of new initiatives that might increase access to educational resources or in other ways spark broader, deeper, and more equitable economic development.

In the United States, two statutes address these concerns. Section 230 of the Communications Act generally immunizes intermediaries such as Google and YouTube from a variety of claims arising from third-party content, among them negligence, defamation, and violations of civil rights laws and state criminal laws. Section 512 of the Digital Millennium Copyright Act affords online service providers a “safe harbor” from liability if they meet certain criteria, including removal of infringing material when notified by the copyright owner of its presence, known as a “notice-and-takedown” system.

Perhaps, this is a perfect time to introduce the First Amendment to the U.S. Constitution which provides that: *“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the*

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

The U.S. system is built on the idea that the free and open exchange of ideas, among other things, encourages understanding, advances truth-seeking, and allows for the ability to rebut falsehoods, in contrast to systems that rely on governments to judge, direct, and control speech.

While the First Amendment to the Constitution provides very broad protections for speech in the United States, freedom of speech is not absolute. While restrictions on speech based on its content are generally unacceptable, there are some narrow exceptions. These include Incitement to Imminent Violence. For example, speech may be restricted if: (1) it is intended to incite or produce lawless action; (2) it is likely to incite such action; and (3) if such action is likely to occur imminently.

This is a very high standard and courts have very rarely found this test to have been met. The First Amendment prevents the Government from silencing a speaker simply because the speech might lead to violence (either from someone who agrees with the speaker or someone who is offended by the speech) if it is not the intention of the speaker to immediately incite lawless action. These exceptions are narrowly drawn to preserve public space for democratic discourse.

One other example of when speech may be restricted on the basis of its content is speech that falls within the narrow class of “true threats” of violence. A true threat means a statement that a reasonable recipient would take to mean that the speaker, or persons working in concert with the speaker, intends to commit bodily harm against the recipient.

Hate speech – which is often defined as speech that vilifies a person or group on the basis of race, religion, sexual orientation, disability, etc. – is generally protected by the First Amendment, provided it does not rise to the level of incitement to imminent violence or a true threat of violence I mentioned earlier.

For example, in our country, Holocaust denial and anti-Semitism are publicly condemned by the Government of the United States, but they are not banned. Insults to Christians are condemned, but they are not banned. Insults to Muslims are condemned, but they are not banned. In the United States, the government’s power is limited by citizens’ rights. The First Amendment of the Constitution has been interpreted to mean that a vibrant and diverse democracy

requires tolerating offensive, misinformed, or false speech because our experience demonstrates that the most effective way to combat hateful speech is with non-offensive, intelligent, and truthful speech.

Some may be wondering about- what about defamation? Doesn't the United States prohibit defamation? Why doesn't that cover insults to religious sensibilities?

In the United States, defamation is a civil action that can be brought by individuals seeking economic compensation for false and malicious statements which injured that person's character, fame, or reputation. Individuals can recover damages for being defamed. However; topics, religions, or even groups – as opposed to individual people – are not protected against defamation. The protections afforded to individuals from being defamed differ according to whether the individual who claims to have been defamed is a private citizen or a public figure, and whether or not the topic is of public concern.

The Supreme Court has ruled that under the First Amendment that public figures cannot recover damages for defamatory statements unless such statements are made with actual malice (i.e., with knowledge it was false or with reckless disregard for whether it was false.)

The Court noted: *“we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”*

As President Obama expressed in his address to the UN General Assembly in September 2012: *“Here in the United States, countless publications provoke offense.... As President of our country and Commander-in-Chief of our military, I accept that people are going to call me awful things every day and I will always defend their right to do so.”*

For private citizens, the Court has explained that there is reduced constitutional value in speech that does not involve matters of public concern and therefore defamation can be established if the statements were false and damaged the person's reputation without a showing of actual malice. These protections against defamation are protections against individuals and do not extend to groups, including religious groups. Religions don't have human rights. Individual humans do. Religions can't be defamed. Their adherents can be insulted, however, by offensive speech directed at religious beliefs. When they

are, it is right to condemn the speech, but wrong (and, in the United States, unlawful) to jail the speaker.

In the U.S., we believe that laws prohibiting so-called “defaming a religion” can also inhibit speech by those seeking to defend the religion, limiting the ability of adherents to respond to the hate speech targeting their faith. Our experience demonstrates that when adherents have the opportunity to expose the discrimination that fuels hate speech, other members of the public work together to support religious communities.

We support remedies for those individuals who are victims of defamation – false statements that damage their reputation. But we believe that these remedies should not include criminal sentences or be used as a reason to ban speech. Instead, as our laws provide, the remedies should include ordering the publication of a correction to a false statement and compensation.

We oppose “criminal libel” laws that allow prosecution for such statements.

Now, as I mentioned earlier, the right to freedom of the media was not designed to fit a particular medium, technology or platform. Freedom of expression applies to all means of communications, including new digital platforms most typified by the Internet.

As you all know, nearly one-third of humankind is online today, something we would have never thought possible 20 years ago, more than 2 billion people and counting. The Internet has become the public space of the 21st century, a sphere of activity for all kinds of activities, open to all people of all backgrounds and all beliefs. And as vibrant, as dynamic as the Internet already is what we’ve seen so far, I believe and we believe, is just an opening act. More than 5 billion people will connect to the Internet in the next 18 years-- 5 billion. And most of them will live in countries and regions that are now under-represented online. And the next generation of Internet users has the potential to transform cyberspace in ways we can only imagine.

And cyberspace, in turn, has the potential to transform their lives, as well.

As Vice President Joe Biden has noted, the Internet itself is not inherently a force for democracy or oppression, for war or for peace. Like any public square or any platform for commerce, the Internet is neutral. But what we do there is not neutral. It’s up to us to decide whether and how we will protect it against the

dangers that can occur in cyberspace while maintaining the conditions that give rise to its many benefits.

We are aware that some governments have already begun to impose controls on the Internet, threatening the potential of this new medium. Popular tactics include incorporating surveillance tools into Internet infrastructure; blocking online services; imposing new, secretive regulations; and requiring onerous licensing regimes. The internationally distributed and interactive nature of the Internet means that any attempt to deal with the Internet in isolation from other countries will be very difficult to accomplish.

In November 2011, Vice President addressed the London conference on cyberspace where explained where the United States stands on key issues regarding the future of cyberspace. During his remarks, he addressed one fundamental aspect relevant to our discussion today. This covers the approach the U.S. government has taken to ensuring that the Internet itself continues to be secure, open to innovation and interoperable the world over; secure enough to earn the trust of our people, and reliable enough to support their work.

The U.S. government has adopted the International Strategy for Cyberspace. We know that it will take many years and patient and persistent engagement with people around the world to build a consensus around cyberspace, but there are no shortcuts because what citizens do online should not be decreed solely by groups of governments making decisions for them. No citizen of any country should be subject to a repressive global code when they send an email or post a comment to a news article. They should not be prevented from sharing their innovations with global consumers simply because they live across a national frontier.

That's not how the Internet should ever work in our view -- not if we want it to remain the space where economic, political and social exchanges can flourish. As such the strategy puts emphasis on ways to harness the best of governments and private sector and civil society to manage the technical evolution of the Internet in real time. This public-private collaboration has kept the Internet up and running all over the world. We have an expression in our country: If it ain't broke, don't fix it. It would be misguided, in our view, to break with the system that has worked so well for so long.

Nils Muižnieks, Council of Europe Commissioner for Human Rights has noted that in contemporary media landscape, journalists and others expressing themselves in the public interest cannot be protected effectively unless care is

taken to protect the Internet itself as a an open space for the exercise of the right to receive and impart information. Maintaining an open Internet, without undue restrictions by the authorities (or the private industry), is therefore an important dimension of enhancing freedom of expression in any country.

In conclusion, the U.S. does not seek to impose its values on any one country but seek to find ways to promote international cooperation to support and promote universally accepted values, including freedom of expression. Our experience shows that no artificial distinctions should be made between the exercise of freedom of expression online and offline.

I thank you and look forward to your questions...